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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,

Petitioner

vs.

THE STATE OF GEORGIA.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF GEORGIA
AND BRIEF IN SUPPORT THEREOF.**

THOMAS HOWELL SCOTT,
Counsel for Petitioner.

ROBERT B. BLACKBURN,
H. A. ALLEN,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,
Petitioner in Certiorari,
vs.

THE STATE OF GEORGIA.
Defendant in Certiorari.

PETITION OF CLARENCE J. THOMPSON FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF THE STATE OF GEORGIA TO REVIEW, CORRECT AND REVERSE THE SAID COURT'S DECISION OF APRIL 3, 1942 VACATING, ON MOTION FOR REHEARING BY THE STATE, ITS JUDGMENT OF JAN. 16, 1942—AND RENDERING OPINION AFFIRMING JUDGMENT OF LOWER COURT. PETITION TO SUPREME COURT OF GEORGIA FOR CERTIORARI * * * PETITION DENIED MAY 21, 1942—MOTION TO RECONSIDER DENIAL WRIT OF CERTIORARI DENIED JUNE 16, 1942.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

UNITED STATES OF AMERICA,
State of Georgia,
County of Fulton.

MAY IT PLEASE THE COURT:

Clarence J. Thompson files this his petition for writ of certiorari to the Court of Appeals of the State of Georgia for the purpose of having reviewed, corrected and reversed a decision of the Court of Appeals of Georgia, entered

April 3, 1942, vacating at the request of the State, on motion for rehearing, a former judgment of said court, of date January 16, 1942, and rendering opinion affirming the judgment of the lower court. The said decision is reported as *Thompson v. The State*, reported in: Southeastern 19. (2nd Series.) Page 777.

The petition of Clarence J. Thompson to the Supreme Court of Georgia for writ of certiorari to the Court of Appeals of Georgia was denied on May 21, 1942, and the motion of Clarence J. Thompson requesting the Supreme Court of Georgia to reconsider and review its action in denying the petition of Clarence J. Thompson for certiorari was denied on June 16, 1942.

The Court of Appeals of Georgia is therefore the highest court of the State of Georgia in which a decision in this case could be had.

PART I.

Summary and Short Statement of the Matter Involved.

1. On the 17th day of January, 1941, an indictment was returned against petitioner, Clarence J. Thompson, by the Grand Jury of Fulton County, Georgia. The indictment as returned being in three counts.

Count one of the indictment charging and accusing petitioner with the offense of misdemeanor (defrauding the City of Atlanta) for that the accused in the County of Fulton and State of Georgia on the first of November, 1940, with force and arms, being then an inspector employed by the city of Atlanta in the Water Works Department, did conspire with Ben I. Tessler to defraud the city of Atlanta, a municipal corporation, out of a large amount of water of the value of \$1,033.36, and the property of said City of Atlanta in the following manner:

The City of Atlanta was engaged in selling and supplying water to consumers. The water sold and supplied to

its customers is paid for on the basis of cubic feet, supplied as measured by the water meter of the City of Atlanta at established rates, the indictment charging that the accused conspired with Ben I. Tessler and did enter into an agreement with Tessler to the effect that for a monetary compensation, consisting of one-half of the amount saved by Tessler, he, the accused, would arrange for his water bills to be less than they would be for the true amount of water used. That in conformity with said agreement, accused did change and alter the meter located at the premises of Tessler in some manner unknown to the grand jurors and that as a result of the fraudulent scheme the City of Atlanta has actually been defrauded out of water of the value of \$1,033.36, contrary to the laws of said State, the good order, peace and dignity thereof.

The other two counts in the indictment were in language the same, except as to persons and amounts (R. 7).

2. Before arraignment and before waiver of arraignment and plea of not guilty, Clarence J. Thompson (petitioner), filed his general demurrer to the indictment as returned, demurring generally and separately to each count of the indictment—contending that the allegations in the indictment charged no offense, and for other reasons set forth, contended that the indictment and each of the three counts in the indictment should be quashed (R. 12).

3. That on the 23rd day of January, 1941, the demurrer as filed to the indictment against petitioner, came on to be heard before a presiding judge of the Superior Court of Fulton County, Georgia, Atlanta Circuit, and the demurrer of petition was by the court overruled (R. 17).

4. Thereafter, petitioner being dissatisfied with the judgment of the court as entered overruling the demurrer to the indictment, excepted to the order of the court, and on the 15th day of February, 1941, filed exceptions *pendente*

lite and presented the same to the court in accordance with the rules of practice and procedure in such cases provided and the same were certified to and ordered filed as a part of the record in said case (R. 17).

5. Thereafter, the cause entitled "The State of Georgia vs. Clarence J. Thompson," came on to be tried in the Superior Court of Fulton County, Georgia, Atlanta Circuit, upon the indictment as set forth, and Clarence J. Thompson, petitioner, entered his plea of not guilty, and the case proceeding to trial before a jury duly impaneled, and upon evidence being adduced, petitioner was found guilty as charged upon each of the three counts, whereupon, the verdict as returned was made the judgment of the court and petitioner was sentenced to serve the period of twelve months on each of the counts, the service to run consecutively (R. 19-20).

6. Petitioner being dissatisfied with the verdict and judgment as entered, in accordance with the rules of practice and procedure in such cases provided, on the 28th day of January, 1941, filed in said Superior Court of Fulton County, Georgia, Atlanta Circuit, a motion for new trial and on the 14th day of June, 1941, the motion for new trial was amended.

7. The motion for new trial as amended coming on to be heard before the presiding judge of the Superior Court of Fulton County, Atlanta Circuit, under and in accordance with the rules of practice and procedure in said court as made and provided by law in such cases and the motion for new trial as amended was by the court overruled (R. 22).

8. To the order of the court denying petitioner's motion for new trial, petitioner excepted and assigned error, and within the time prescribed by law, a bill of exceptions

was presented assigning error upon the judgment overruling the motion for new trial and likewise assigning error on exceptions *pendente lite* to the judgment of the court overruling the demurrer of petitioner to the indictment as returned against him and, upon the writ of error, the case was appealed to the Court of Appeals of Georgia (R. 1-7).

9. The case coming on to be heard in the Court of Appeals of Georgia upon the assignment of error as made, the Court of Appeals of Georgia on January 16, 1942, rendered judgment in the case entitled "Clarence J. Thompson, Plaintiff In Error vs. The State of Georgia, Defendant In Error", reversing the judgment of the lower court because the court erred in not quashing the indictment (R. 22).

10. Thereafter, the State of Georgia, as defendant in error in the stated case, filed a motion for rehearing on Jan. 24, 1942.

11. Clarence J. Thompson, in response to the motion for rehearing, filed a motion in the Court of Appeals of Georgia to dismiss the motion for rehearing as filed by the State of Georgia, contending in said motion that the Court of Appeals of Georgia did not have authority as a matter of law to entertain a motion for rehearing in a criminal case and that, in criminal cases, the state did not have the right to move for a rehearing. That the State in such cases was not a party and could not be legally held to be a party for the purpose of appeal (R. 27).

Thereafter the Court of Appeals of Georgia entertained the motion for rehearing and issued rule *nisi* directed to counsel for Clarence J. Thompson to show cause at a stated time why the judgment of the court of January 16, 1942 should not be vacated (R. 32).

12. Thereafter on April 3, 1942, the Court of Appeals of Georgia entered judgment reciting that upon consideration of the motion for rehearing in the case of *Clarence J. Thompson v. State*, it was ordered that the judgment of the Court of Appeals of Georgia rendered therein on January 16, 1942, be vacated and the opinion be withdrawn from the files, and on the same date, to-wit, April 3, 1942, the Court of Appeals of Georgia in the same case designated as No. 29257, rendered a decision and judgment affirming the decision of the lower court in overruling the demurrer of Clarence J. Thompson to the indictment as returned against him in the Superior Court of Fulton County, Georgia, Atlanta Circuit, and likewise affirming the verdict and the judgment of the Superior Court of Fulton County, Georgia, Atlanta Circuit, in finding Clarence J. Thompson guilty of the offense as charged and holding further in said opinion and judgment that the State could file a motion for rehearing and in said judgment, overruled the motion of Clarence J. Thompson, the plaintiff in error in the stated case, to strike the motion for rehearing as filed by the State of Georgia (R. 47).

13. The judgment of the Court of Appeals of Georgia affirming the judgment of the lower court was by a divided bench. His Honor, Associate Justice Gardner dissenting (R. 41).

14. Thereafter, petitioner, Clarence J. Thompson, being dissatisfied with the judgment of the Court of Appeals of Georgia as rendered in the case styled "Clarence J. Thompson, Plaintiff in Error vs. State of Georgia, Defendant in Error," designated as No. 29257, gave written notice to the Clerk of the Court of Appeals of Georgia, of his intention to apply to the Supreme Court of Georgia for a writ of certiorari within thirty days from the filing of the judgment of the Court of Appeals of Georgia. This notice being given on the 6th of April, 1942 (R. 48).

15. Thereafter, petitioner, Clarence J. Thompson, on the 2nd day of May, 1942, prepared and filed with the Clerk of the Supreme Court of Georgia a petition, the issuance of the writ of certiorari within the time allowed by law to review and reverse the decision of the Court of Appeals of Georgia, contending in said petition for certiorari that the decision of the Court of Appeals was without warrant and lawful authority, and that said decision contravened constitutional law (Exhibit "B").

16. On May 2, 1942, the Clerk of the Court of Appeals of Georgia was officially notified by the Clerk of the Supreme Court of Georgia that there had been filed an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of *C. J. Thompson v. The State of Georgia* under case No. 14210 (R. 48).

17. Thereafter, to-wit, on May 21, 1942, the Supreme Court of Georgia in the case of *C. J. Thompson v. The State*, the Supreme Court of Georgia upon considering the application for certiorari, filed, to review the judgment of the Court of Appeals in the case stated, ordered that the writ be denied—no opinion (R. 49).

18. Thereafter, petitioner filed with the Clerk of the Supreme Court of Georgia, a motion directed to the Supreme Court of Georgia in the case of *C. J. Thompson v. The State*, requesting the Supreme Court to reconsider its judgment in denying the application for certiorari in the stated case.

19. The motion to reconsider coming on to be heard, the Supreme Court of Georgia on June 16, 1942, in the case of *C. J. Thompson v. The State* entered order reciting—Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be denied—as will be shown by certified copy of the order as passed by the Supreme Court of Georgia, as hereto attached and made a part of this petition for certiorari, the same marked Exhibit "C" reference to which is prayed.

PART II.

**Basis of Supreme Court's Jurisdiction to Review Judgment.
Questions Involved.**

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code (U. S. C. A. Title 28, Section 344 (B)), which reads as follows:

"It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the State where a decision could be had where is drawn to question the validity of a treaty or statute of the United States or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

1. Petitioner assigns as error, the judgment of the Court of Appeals of Georgia, dated April 3, 1942, vacating the judgment entered by it in the same case, the judgment vacated being entered of date January 16, 1942, in which judgment the Court of Appeals reversed the judgment of the lower court—Because the Court erred in not quashing the indictment.

Petitioner contends that the judgment of the Court of Appeals of Georgia, of date, January 16, 1942, reversing the judgment of the lower court—*Because—The court erred in not quashing the indictment*—was a judgment final in its nature and was a disposition of the case. That

upon entering the judgment quashing the indictment, the court lost entire and complete jurisdiction of the subject matter and the person. The case being one that involved crime.

2. Petitioner contends further that the effort to recall and vacate the solemn and final judgment was without warrant or authority and was in, and of itself, in contravention of and in violation of Amendment 8, Article 5 of the Constitution of the United States which provides:

“That no person shall be subject for the same offense, to be twice put in jeopardy.”

3. Petitioner further contends that the last judgment of the Court of Appeals of the State of Georgia rendered on the 3rd day of April, 1942, was contrary to and in contravention of the 14th Amendment of the Constitution of the United States which provides:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.”

4. Petitioner contends further that the judgment complained of was in conflict with and in violation of the Constitution of the State of Georgia in that it contravened Article 1—Section 1, paragraph 8 of said Constitution, which provides:

“No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her motion for a new trial, or in case of mistrial.”

5. Petitioner contends further that the judgment complained of violated Article 1—Section 1—Paragraph 3 of the Constitution of the State of Georgia which provides:

“That no person shall be deprived of life, liberty or property without due process of law.”

Petitioner shows that this decision of the Court of Appeals of the State of Georgia necessarily involved a construction of the 14th Amendment of the Constitution of the United States and of Article 1, Section 1, Paragraph 3, of the Constitution of Georgia and was contrary thereto, because the term "due process of law" means that a defendant in every criminal case is to be tried as every other defendant is tried in accordance with the law of the land in the State where he is charged with crime and petitioner contends that the last decision of the Court of Appeals of the State of Georgia deprived him of being tried in accordance with the law of the land in the State where he is charged with crime, because Section 1—Article 1—paragraph 8 of the Constitution of the State of Georgia provides:

"No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her motion for a new trial after conviction, or in case of a mistrial."

Petitioner shows that in the trial court, he had filed his demurrer to the indictment at the proper time and it had been passed upon by the trial court at the proper time and in the proper way, and had assigned error thereon in the Court of Appeals and when the Court of Appeals rendered its first judgment in said case, it held and decided: That the trial court erred in overruling the demurrer and further held and decided that it was error to overrule the same, and did reverse the trial court and held that the demurrer should have been sustained, and the indictment quashed, which first judgment of the Court of Appeals did have the effect of deciding that the indictment was invalid and discharging the defendant thus ending the case.

The case then pending against him came to an end and was fully adjudicated by a court of competent jurisdiction—and the State was without the right of appeal.

6. The attempt on the part of the same judicatory to take back what it had spoken was an arbitrary exercise of power, with which it was not clothed and cannot be held as of binding force.

By the judgment of the Court of Appeals of Georgia, of date April 3, 1942, the judgment of the same court and between the same parties of date, January 16, 1942, was reversed.

Under the judgment of January 16, 1942, petitioner was acquitted, by the quashing of the indictment.

By the judgment of April 3, 1942, the freedom vouchsafed to him was arbitrarily recalled, and he was twice put into jeopardy for the same offense and he likewise was deprived of his liberty without due process of law by a decision that was invoked on a motion for rehearing, filed by the State in a criminal case, in violation, not only of constitutional provisions of the Constitution of the United States and the State of Georgia, but also in defiance of, and in an arbitrary failure to recognize an unbroken line of decisions by the United States Supreme Court and the Supreme Court of Georgia, as well as other courts of last resort for over one hundred years.

7. The decision of the Court of Appeals complained of expressly, overruled the motion of Clarence J. Thompson to strike the motion for rehearing as filed by the State in the instant case.

The Court of Appeals of Georgia in rendering its opinion, refused to follow the unbroken line of authorities on the subject, including *United States v. Sanges*, 144 U. S. 310; *The State of Georgia v. William Jones*, 7th Georgia, Supreme Court Reports, Page 422 and authorities therein cited. *State v. Lovin*, 25th Ga. 311. *State of Georgia v. Johnson*, 61st Georgia 641. *Mayor and Council of Hawkinsville v. Etheridge*, 96 Ga. 326. *Eves v. State*, 113th Ga.

750, in such a manner as to create a presumption that to be so unreasonable and arbitrary as to amount to a denial of due process of law, and of the equal protection of the law and in violation of the provisions of the Constitution of the United States and the Constitution of the State of Georgia as hereinbefore set forth.

8. Petitioner contends that up to the time at which the State of Georgia filed its motion for rehearing in the Court of Appeals of Georgia to review its judgment quashing the indictment in the case of *Clarence J. Thompson v. The State*, none of the assignments of errors as herein set forth could have been made.

9. Petitioner contends that the violation of the provisions of the Federal and State Constitutions could not have been invoked until the Court of Appeals of Georgia rendered this judgment of April 3, 1942, in which judgment the Court of Appeals of Georgia for the first time, contravened constitutional law by entertaining and granting a motion for a rehearing in the criminal case, and vacated a solemn judgment of acquittal, in favor of petitioner and by withdrawing a previous opinion in the same case and rendering another opinion in contradiction of the first; and by the last opinion, placing petitioner in jeopardy for the same offense the second time, depriving him of his liberty without due process of law.

10. Petitioner contends that the decision complained of, in itself, without resorting to matter dehors the record, sets forth reasons and conclusions which in of themselves, contravenes the provisions of the State and Federal Constitutions as noted; and petitioner contends that the decision of the Court of Appeals of Georgia of April 3, 1942, is void on its face and that the Court of Appeals of Georgia in rendering such decision, committed error of a nature requiring the grant of certiorari.

11. The assignments of error upon the opinion of the Court of Appeals of date, April 3, 1942 (which decision was rendered upon a motion for rehearing on behalf of the State) were made in the petition for certiorari addressed to The Supreme Court of Georgia, for the purpose of reviewing and reversing the judgment complained of, as will fully appear by a certified copy of the petition for certiorari to the Supreme Court of Georgia, which is hereto attached and made a part of this petition, the same being marked Exhibit "B."

PART III.

Reasons Relied Upon for the Allowance of Writ.

1. Petitioner contends this writ of certiorari should be granted as a matter of Federal constitutional right by the Supreme Court of the United States upon all grounds urged under parts I, II, and III, and for the reasons shown in the brief accompanying it.

2. The decision of the Court of Appeals of Georgia, of date, April 3, 1942, as herein excepted to is in direct conflict with applicable provisions of the Constitution of the United States and the Constitution of the State of Georgia as set forth in Part II of this petition, in the exceptions *pendente lite* (R. 17) and in the main Bill of Exceptions (R. 1-19, inclusive) appealing the case to the Court of Appeals of Georgia, assigning error upon the overruling of petitioner's demurrer to the indictment and in the certified record of the case attached to the petition as Exhibit "A" and "B" and "C."

3. The decision excepted to is at variance with an unbroken policy as it relates to the paramount duty of the State in the administration of law under our constitutional form of Government.

4. This petition for certiorari sets forth substantial questions of utmost public concern in that they involve questions affecting the laws of criminal procedure in State and Federal Courts invoking construction of and application of provisions of the Constitution of the United States and the Constitution of the State of Georgia in which human rights, privileges and immunities are entangled.

PART IV.

The decision of the Court of Appeals of Georgia sought to be reversed is the decision of said court, of date, April 3, 1942, vacating the judgment of January 16, 1942, and the opinion of said court affirming the judgment of the lower court, as entered upon the motion for rehearing on behalf of the State of Georgia—Justice Gardner dissenting (R. 32 to 47, inclusive reported in 19 S. E., Page 777, 2nd Series.

The petition for certiorari in the Supreme Court of Georgia to reverse and review said decision was denied on May 21, 1942.

Petitioner's motion in the Supreme Court of Georgia for rehearing and reconsideration of its order denying writ of certiorari—was denied on June 16, 1942.

Petitioner submits as his Exhibit "A" a certified copy of the record in the Court of Appeals of Georgia in this case, containing a certificate from the Clerk of the Supreme Court of Georgia showing that his petition for certiorari was denied on May 21, 1942, and the remittitur from the Supreme Court of Georgia was filed in the Clerk's office of the Court of Appeals of Georgia on June 18, 1942.

Petitioner also submits as his Exhibit "B" a copy of his petition for certiorari in the Supreme Court of Georgia, certified to by the Clerk of the Supreme Court of Georgia.

Petitioner also submits as his Exhibit "C" a certificate

from the Supreme Court of Georgia showing that the motion of petitioner for the Supreme Court of Georgia to reconsider its order in denying petitioner's application for certiorari of date May 21, 1942,—was denied on June 16, 1942.

V.

WHEREFORE, petitioner prays that an order granting this petition for certiorari be entered, notifying the Court of Appeals of Georgia of the granting of the petition and that the certified transcript of all proceedings of said Court of Appeals of Georgia in the cause entitled on its docket as 29257—*Clarence J. Thompson v. The State of Georgia* transmitted herewith—be treated as though sent up in response to a formal writ, to the end that the said cause may be reviewed and determined by this Court as provided in U. S. C. 344 (B) that said judgment of the Court of Appeals of Georgia in said cause may be reversed by this Court, and that petitioner may have such other and further relief in the premises as this Honorable Court may deem appropriate.

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